Filed 4/26/06 Brown v. Bank of Visalia CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MIKAEL BROWN et al.,

Plaintiffs and Appellants,

v.

BANK OF VISALIA, INC. et al.,

Defendants and Respondents.

F046603

(Super. Ct. No. 04-209543)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Starr Warson for Plaintiffs and Appellants.

Baker, Manock & Jensen, Charles K. Manock, Matthew E. Farmer, and Albert J. Berryman for Defendants and Respondents.

-ooOoo-

The question we must answer in this case is whether the trial court properly sustained defendants' demurrers, without leave to amend, under res judicata principles. Asserting many contract and tort theories, plaintiffs sued defendants for damages allegedly arising from nonpayment of proceeds from the sale of oranges. Three years earlier, the same plaintiffs were part of a group of plaintiffs who sued some (but not all) of the same defendants. The earlier case was an action for an accounting, arising from

nonpayment of proceeds from the sale of the same oranges. The parties settled that case by means of a stipulated judgment.

The trial court correctly ruled that the stipulated judgment was res judicata and a bar to this action. Plaintiffs' central argument in this appeal—that they could not institute the action for damages until after the action for an accounting was completed and they received the documents for which they settled—represents a misunderstanding of the nature of an action for an accounting. Nothing prevented plaintiffs from pursuing damages in the original case, and nothing compelled them to settle that case before a determination of their right to damages. Plaintiffs made a choice in the original case to pursue only one aspect of their cause of action arising from nonpayment of orange sales proceeds. The res judicata doctrine's prohibition of claim splitting means they are not entitled to bring a second lawsuit on another aspect. We deny defendants' motion to dismiss the appeal and affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

The complaint in the original case was filed in October 2001 by an unincorporated association called the Associated Grower/Creditors of Kaweah Citrus Association (the growers). This group consisted of 25 orange farmers, 10 of whom are the plaintiffs in this case. The defendants in the original case were Kaweah Citrus Association, LLC (Kaweah), Sunkist Growers, Inc. (Sunkist), and Kaweah-Oxnard Fruit Exchange, Inc. (Fruit Exchange).

The original complaint alleged that the growers were members of Sunkist and Fruit Exchange, which are produce-marketing cooperatives. Kaweah was a packinghouse and farm-labor contractor that contracted with the growers to harvest, pack, and ship their navel oranges for the 2000-2001 growing season. Sunkist located buyers and executed sales of oranges on behalf of the growers. Fruit Exchange then directed the transfer of oranges from Kaweah to the buyers. The buyers paid Sunkist for the oranges, and Sunkist passed the money back down the chain to Fruit Exchange, which passed it to

Kaweah, which finally passed it to the growers. Each participant deducted costs as the money went through its hands.

After the 2000-2001 season, according to the original complaint, Kaweah did not pay in full. Instead, it paid 34 percent of the proceeds due and informed the growers that its funds were exhausted. In response, the growers asked Sunkist, Fruit Exchange, and Kaweah for permission to inspect their accounting records, but permission was denied. In the complaint, the growers alleged that there had been "inequities done by Kaweah," specifically that "costs have been paid in full by Kaweah and that only the growers have been shorted in the plan" and "there have been preferential payments of accounts in full from the money to be paid to the growers." The complaint stated that "only an accounting will tell if this is true."

An accounting was the sole relief requested in the complaint for nonpayment of the 2000-2001 growing season sales proceeds. The growers prayed for a "full and accurate accounting" from Sunkist, Fruit Exchange, and Kaweah of all the fruit packed and sold and the costs deducted for three years. They also requested Kaweah's financial statements.

The original complaint also sought to ensure payment of certain monies unrelated to the 2000-2001 sales proceeds. These fell into two categories. The first was "returns for deferred capital reserves, assessments and other withholdings that are customarily withheld" by the cooperatives and later passed back to the growers through the packinghouse. The second was "returns for … juice and processed fruit" which are "customarily paid long after the fruit is processed." Those returns also are normally passed back to the growers through the packinghouse. To prevent these monies from being intercepted and kept or paid to other creditors by Kaweah, the complaint prayed for an accounting of them from each defendant and sought to require Sunkist and Fruit Exchange to pay the funds due into a "blocked bank account to be paid to Plaintiffs

equitably under the Court's supervision," instead of paying them through Kaweah as usual.

About six weeks after the complaint was filed, the growers, Sunkist, and Fruit Exchange entered into a stipulation. Sunkist and Fruit Exchange promised to provide records pertaining to both the sales proceeds and the other funds. They also agreed to "account for all capital withholding monies collected and retained by" them on behalf of the growers, and to "account for all juice and product proceeds remaining unpaid to" the growers. (It is unclear whether "juice and product proceeds" meant only the "returns for … juice and processed fruit" referenced in the complaint or also included the 2000-2001 fresh orange sales proceeds.) Sunkist and Fruit Exchange further promised to "pay such funds into blocked account(s) … to be released and distributed upon order of the Court or by mutual agreement of the … parties." The growers agreed to dismiss Sunkist and Fruit Exchange from the suit with prejudice "within 60 days of satisfactory compliance" with the stipulation. The court entered the stipulation as an order on November 30, 2001.

Kaweah was not a party to the stipulation. In August 2002, almost a year after the original complaint was filed, the court entered a default judgment against Kaweah. It ordered Kaweah to provide the accounting information requested in the complaint.

On November 26, 2003, two years after the stipulation was entered, the growers filed a motion in the original case for leave to amend the complaint. The proposed amended complaint substituted the 10 farmers in the present case for the original growers' group, added three new defendants, and removed Sunkist and Fruit Exchange as defendants. It added eight new contract and tort causes of action and prayed for damages. The court's order on this motion is not in the record presented to us by the parties. Plaintiffs state that the motion was denied on the ground that the stipulated judgment concluded the case, so there was no pending case in which an amended complaint could be filed.

Finally, in April 2004, plaintiffs filed the complaint in this case. It named Kaweah, Sunkist, and Fruit Exchange as defendants and added six new defendants: Pro-Ag, Inc., described as a 90-percent member of Kaweah; Ted Dinkler, Jr., described as a 10-percent member of Kaweah; Kenneth and Jean Crandall, "shareholders, officers and managers" of Pro-Ag; Bank of Visalia; and Goodell Packing Corporation (Goodell).

The general theme of the complaint is that defendants diverted the 2000-2001 sales proceeds to other purposes before they could reach plaintiffs, even though the proceeds were plaintiffs' property and defendants had no right to appropriate them. Sunkist, plaintiffs alleged, used some of the proceeds to offset a loan it made to Kaweah, even though this loan was for Kaweah's operations in an earlier year in support of different growers. Sunkist also used some of the proceeds to pay other creditors of Kaweah. Kaweah allegedly diverted some of the proceeds to pay for its own operations and those of Pro-Ag, as well as the personal expenses of Dinkler and the Crandalls. Kaweah also allegedly used plaintiffs' proceeds to make payments on a loan from Bank of Visalia. The complaint asserted that Kaweah was an alter ego of Pro-Ag, Dinkler, and the Crandalls, all of whom therefore were liable for Kaweah's misuse of the proceeds.

Goodell was a packinghouse that, without plaintiffs' consent, allegedly took control of plaintiffs' oranges remaining at Kaweah's facility after Kaweah became insolvent and ceased operations. Goodell packed and shipped the oranges to buyers but never remitted any proceeds to plaintiffs.

Against Fruit Exchange, the complaint alleged that it had a duty to safeguard the proceeds and inform plaintiffs that Sunkist was paying them directly to Kaweah and making other unauthorized payments instead of routing the funds through Fruit Exchange, as was customary. Fruit Exchange did nothing to prevent Sunkist from doing these things or to inform plaintiffs about them.

Based on these facts, the complaint alleged a variety of tort, contract, and other causes of action. These included breaches of plaintiffs' contracts with Kaweah and

Sunkist; conversion by Sunkist, Goodell, Kaweah, and those defendants of which Kaweah was alleged to be the alter ego; fraud by Kaweah and Sunkist; and unjust enrichment of all defendants. The complaint prayed for damages based on the unpaid proceeds and also requested an accounting from Kaweah, Sunkist, Fruit Exchange, and Goodell. It sought the imposition of a constructive trust against Bank of Visalia on funds remitted to it by Kaweah.

Sunkist, Fruit Exchange, Bank of Visalia, and Goodell filed demurrers. Sunkist and Fruit Exchange argued that they and plaintiffs were parties to the original action, that plaintiffs sought to vindicate the same primary right in both actions, and that the present action therefore was barred under the claim-preclusion component of the doctrine of res judicata. Bank of Visalia and Goodell argued that, although they might not be able to assert claim preclusion because they were not parties to the original action, the same issues were raised and decided in the original action as were presented in the present action. Consequently, they were entitled to dismissal under the issue-preclusion or collateral-estoppel component of res judicata.

The trial court agreed with defendants and sustained the demurrers without leave to amend. The case was dismissed with respect to the four demurring defendants.

DISCUSSION

I. Motion to dismiss

Defendants moved to dismiss the appeal on the ground that the notice of appeal was untimely and insufficiently specific. We disagree.

Plaintiffs filed their notice of appeal on October 20, 2004. Rule 2 of the California Rules of Court requires a notice of appeal to be filed before 60 days after the superior court clerk mails the appealing party notice of entry of the judgment. The court mailed notice of the order sustaining defendants' demurrers on August 16, 2004, 65 days before plaintiffs filed the notice of appeal.

Rule 3 of the California Rules of Court, however, provides for an extension of the time to appeal if the appealing party files a "valid" motion to vacate the judgment or to reconsider an appealable order. (Cal. Rules of Court, Rule 3(b) & (d).) After the demurrers were sustained, plaintiffs filed a "Motion to Reconsider Order, to Vacate and Set Aside Order and Make New Order." If this was a valid motion to vacate or reconsider, plaintiffs were entitled to the extended time.

Defendants argue that it was not a valid motion because it was not timely filed. Defendants are incorrect. Plaintiffs' motion relied on Code of Civil Procedure section 1008 (motion to reconsider) and section 663 (motion to vacate). A motion under section 1008 must be filed "within 10 days after service upon the party of written notice of entry of the order" of which reconsideration is requested. (Code Civ. Proc., § 1008, subd. (a).) Where, as here, service is by mail, deadlines running from the date of service are extended by five days. (Code Civ. Proc., § 1013, subd. (a).) A motion under section 663 must be filed within 15 days of mailing of the notice of entry of judgment by the clerk, with no extension for service by mail. (Code Civ. Proc., § 663a.) Under either section 1008 or section 663, therefore, plaintiffs' motion was due 15 days after the superior court mailed notice of the order sustaining the demurrers. As noted, the court mailed notice on August 16, 2004. Plaintiffs' motion was filed on August 30, 2004, 14 days later.

Defendants are incorrect in arguing that the five-day extension does not apply to a section 1008 motion because of the effect of Code of Civil Procedure section 1005, subdivision (b). Section 1005 applies only to proceedings for which "no other time or method is prescribed by law" (Code Civ. Proc., § 1005, subd. (a)(13)), and section 1008 provides its own time limit for filing the motion after service of notice of the order. In any event, section 1005 governs the time between notice of a motion and the hearing on the motion, and the time between motion and opposition and opposition and reply—not the time between service of notice of an order and a motion to reconsider the order.

Defendants also argue that plaintiffs' motion was not valid under section 1008 because a section 1008 motion cannot be granted after judgment has been entered. This was, in fact, the ground on which the trial court relied in denying the motion under section 1008. It is irrelevant here, however, because a motion is valid for purposes of the extension of time provided by rule 3 of the Rules of Court so long as it is procedurally proper. It need not be substantively meritorious. (Advisory Com. com., Cal. Rules of Court, rule 3.) The question of whether the court's decision could properly be reconsidered under section 1008 was a question of the merits of the motion, not a question of its procedural propriety. Defendants cite two cases arguably standing for the view that a motion is not valid within the meaning of rule 3 if it is substantively very weak, but those cases long predate the 2002 Advisory Committee comment. (*Lamb v. Holy Cross Hospital* (1978) 83 Cal.App.3d 1007, 1010; *Estate of Welch* (1956) 146 Cal.App.2d 534, 538.)

Defendants further contend that plaintiffs' motion was not valid under Code of Civil Procedure section 663 because the notice of motion did not cite section 663 and therefore did not sufficiently state the grounds of the motion. The notice of motion did, however, provide a list of claimed grounds. Further, the notice of motion and memorandum of points and authorities were a single document, and the memorandum did cite section 663. Defendants did not argue in their opposition papers in the trial court that plaintiffs' motion papers failed to apprise them of the grounds for the motion and we see no basis for that argument.

Next, defendants contend that plaintiffs failed to file a "notice of [their] intention [to make a motion], designating the grounds upon which the motion will be made, and specifying the particulars in which" the court's decision was incorrect. (Code Civ. Proc., § 663a.) Defendants cite no authority for the proposition that the motion papers themselves could not constitute notice of plaintiffs' intention, and we see no reason why they would not.

Defendants also make an argument to the effect that plaintiffs' section 663 motion was invalid because the reasons plaintiffs advanced for vacating the judgment failed to justify doing so. As we have already observed, a motion does not have to be substantively meritorious to be validly filed for purposes of the extension of time to appeal provided by rule 3 of the California Rules of Court.

Even if the motion were valid with respect to Sunkist, Fruit Exchange, and Goodell, defendants assert that it was not valid with respect to Bank of Visalia. Although Bank of Visalia is the only bank that has ever been involved at any stage of the case, plaintiffs' motion papers referred to "Visalia Community Bank" throughout. Defendants made the argument in the trial court that no motion was brought against Bank of Visalia. The trial court agreed, stating that "[t]his motion does not address Bank of Visalia, Inc.[;] therefore[,] any ruling would not affect Bank of Visalia, Inc."

For purposes of applying the California Rules of Court, rule 3, extension of time to appeal from the judgment in favor of Bank of Visalia, however, we conclude that the motion was adequate. Like the other three defendants, Bank of Visalia opposed the motion on its merits. It is obvious from defendants' opposition papers that they knew Visalia Community Bank was named in error and Bank of Visalia was intended. Defendants stated:

> "Plaintiffs have addressed their motion against various Defendants including 'Visalia Community Bank.' Defendant BANK OF VISALIA, INC. ("Bank of Visalia")[,] is not specifically referenced anywhere in the moving papers. This error cannot be considered to be a 'clerical error,' because it is repeated at … eight locations in their Memorandum of Points and Authorities …."

Although this was meant to show that the motion could not be granted against Bank of Visalia, the reference to Bank of Visalia and the "error" of using another name shows that Bank of Visalia knew perfectly well what had happened. Further, this statement came at the end of a brief in which all four of the dismissed defendants argued the merits of the motion. There is little doubt that Bank of Visalia knew it was intended to be

named in the motion, knew the appearance of a different name in the papers was a mistake, and had a full opportunity to respond and did respond to the motion on its merits. We see no conceivable prejudice to Bank of Visalia and no reason not to deem the motion valid for purposes of the rule 3 extension.

Finally, defendants contend that the notice of appeal was invalid because it did not specify the order or orders appealed from or name the defendants against whom the appeal was directed. They rely on *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43, in which the court refused to consider an appeal from an award of attorney fees. In that case, the attorney-fee award was made a month *after* the appellant appealed from the judgment in the underlying case by filing a notice of appeal specifically identifying that judgment. No additional notice of appeal from the attorney-fee award was ever filed.

The facts of this case are not at all similar. On August 16, 2004, the trial court clerk mailed the parties a notice of the order sustaining the four defendants' demurrers without leave to amend. Two days later, defendants' counsel mailed a notice of entry of orders to plaintiffs' counsel. This notice listed and attached four orders: the one the court mailed to the parties on August 16, 2004, and three others, drafted by counsel, separately sustaining defendants' separate demurrers. (Sunkist and Fruit Exchange demurred together in one document.) Plaintiffs' notice of appeal stated only that it concerned a "[j]udgment of dismissal after an order sustaining a demurrer."

Defendants cannot credibly claim to be confused about the nature of plaintiffs' appeal. Like their response to the motion to vacate and reconsider, defendants' briefing on appeal shows that they were in no doubt about what or who was being addressed. All four defendants responded to the appeal on its merits.

For all these reasons, we conclude that the notice of appeal was timely and that its content was sufficient. The motion to dismiss the appeal is denied.

II. Res judicata

Plaintiffs contend that the trial court erred in sustaining the demurrers. We recently restated the pertinent standard of review:

> "In an appeal from a judgment dismissing an action after a general demurrer is sustained without leave to amend, our Supreme Court has imposed the following standard of review. 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

The only argument plaintiffs make on appeal is that the present action was not barred by res judicata because the claims advanced in the two lawsuits were based on different primary rights. As we will explain, we disagree.

The doctrine of res judicata is divided into two parts. The first part, called claim preclusion (res judicata), bars a party to an action in which final judgment has been obtained from bringing a new action against the same opposing party and seeking recovery based on the same cause of action as was relied on in the first action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 (*Mycogen*).) "Cause of action" in this context does not mean "legal theory." It means "primary right," a concept we discuss further below. (*Id.* at p. 904; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) Claim preclusion only applies if the parties to the new action are identical with or in privity with the parties to the prior action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-829; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951.) Privity exists

if the party to the new action is "'"… so identified in interest with [a party to the prior action] that he represents the same legal right."'" (*Id.* at p. 951.)

The second part, called issue preclusion or collateral estoppel, bars a party from relitigating in a new action an issue that was actually litigated and decided in a prior action. (*Mycogen, supra,* 28 Cal.4th at p. 896; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) A party in the new action may advance collateral estoppel as a defense against a party who previously litigated the same issue even if the party advancing collateral estoppel was a stranger to the prior action. (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at pp. 828-829; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812-813; *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal.App.3d 410, 417.)

The difference between a primary right, which may not be reasserted under claim preclusion, and an issue, which may not be relitigated under issue preclusion, is crucial. A primary right may include several issues, none of which may be raised again if claim preclusion applies, even those that were not raised in the prior action. (*Mycogen, supra,* 28 Cal.4th at p. 904; *Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) An attempt to raise an issue in the new action that is within the primary right advanced in the prior action but not actually litigated in that action is called "claim splitting" and is not permitted under claim preclusion. (*Mycogen, supra,* 28 Cal.4th at pp. 900, 903; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) Under issue preclusion, by contrast, a party is barred from raising an issue only if it was actually litigated and decided in the prior action. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346.)

Because of this difference, the question of whether the parties to the new action are identical or in privity with the parties to the prior action is very important. A party to the new action who was a stranger to the prior action can rely on issue preclusion, but not claim preclusion. To prevail under a theory of issue preclusion, a stranger to the prior action must show not just that the issue in the new case is part of the same primary right

the opposing party relied on in the prior action, but that it is the same as an issue that was actually litigated and decided in the prior action.

In this case, plaintiffs concede that none of the four defendants were strangers to the prior action, even though two of them, Goodell and Bank of Visalia, were not named in that action. Plaintiffs admit that Goodell and Bank of Visalia are in privity with the parties to the prior action: "Appellants present no argument that either the Bank or Goodell were not in privity with [Kaweah] who was a party to the [prior action]." Accordingly, plaintiffs state that the only question is whether the same primary right was at issue in both cases:

> "Appellants submit that if the Appellate Court finds the Trial Court had the proper result for Sunkist and [Fruit Exchange], then the Trial Court had the correct result for the Bank and Goodell. However, if it is found [that the prior and new actions] represent two separate primary rights and Appellants' claims against Sunkist and the Exchange are to be litigated, then Goodell and the Bank would likewise be subject to the Complaint and litigation."

In other words, plaintiffs expressly decline to make the argument that Goodell and Bank of Visalia are prevented from asserting claim preclusion because they were not parties to the prior action or privies of parties.

We turn to the application of claim preclusion to the facts of this case. Claim preclusion bars a cause of action if (1) the same cause of action was advanced in a prior action; (2) the prior action resulted in a final judgment on the merits; and (3) the parties to the present action are the same as, or in privity with, the parties to the prior action. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.) Plaintiffs concede the identity-or-privity-of-parties element. A stipulated judgment may at least sometimes be given the preclusive effect of a final judgment for res judicata purposes (see *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664), and plaintiffs do not contend that the stipulated judgment in the prior action was not a final judgment on

the merits. The only question is whether the prior and present suits advanced the same cause of action.

Under California law, for res judicata purposes, a single cause of action arises from the invasion of a single primary right. (*Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered." (*Crowley v. Katleman, supra,* 8 Cal.4th at pp. 681-682.) Multiple legal theories and remedies can be based on a single injury, and a failure to assert any of the available theories or claim any of the available remedies in an action based on the injury means they are barred by claim preclusion subsequently. (*Mycogen, supra*, 28 Cal.4th at pp. 904-906, 907 [judgment granting specific performance of breached license agreement barred later action for damages for breach of same agreement]; *Slater v. Blackwood, supra*, 15 Cal.3d at p. 795.) On the other hand, the fact that the two lawsuits are premised on the same set of facts does not necessarily mean they assert the same primary right. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954-955 [prior judgment for employer in racial discrimination suit brought under federal civil rights law was not res judicata with respect to employee's subsequent suit, based on same termination of employment, for defamation and intentional infliction of emotional distress], overruled on other grounds by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.)

The complaint here is based on an injury that was asserted in the prior action: nonpayment of a portion of the proceeds of the sale of oranges for the 2000-2001 season. The complaint and stipulation in the prior action also addressed injuries arising from capital withholdings and monies owed for juice and processed fruit, but plaintiffs do not claim that the prior action was confined to those injuries. To the contrary, plaintiffs admit that they were "incidental." The focus of both complaints is the nonpayment of proceeds of the sale of the 2000-2001 oranges.

Plaintiffs' main argument is that the prior case was an action for an accounting, the present case is a suit for damages, and filing the suit for damages was a practical

impossibility until after the action for an accounting was decided. Plaintiffs argue that they refrained from seeking damages in the prior action because they had "insufficient understanding of the actions of the Defendants" to seek damages; it was "functionally impossible to make the allegations of wrongdoing" in the prior action; and it would have been improper to do so "without adequate evidence of the wrongdoing that is complained of." It was not until after the action for accounting was settled and defendants produced documents that plaintiffs understood how their money was diverted by defendants.

The assertion that it was impossible to seek damages in the accounting action is incorrect, however. An action for an accounting is a proceeding "for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice." (*Verdier v. Superior Court* (1948) 88 Cal.App.2d 527, 530.) It normally includes a prayer for monetary relief. In *Verdier,* for instance, the complaint for an accounting "expressly pray[ed] judgment 'that defendant pay over to plaintiff all such monies as may be found to belong to plaintiff ….'" (*Id.* at p. 530.) In the usual procedure, the trial court first determines whether the plaintiff is entitled to an accounting. If it is, the trial court either takes evidence and makes a finding of the amount due, or appoints a referee to do so. The final judgment states the amount of the plaintiff's recovery. (*Stoll v. Selander* (1947) 81 Cal.App.2d 286, 294.) Nothing prevented plaintiffs from seeking relief of this kind in the prior action.

Plaintiffs' contention that they did not know enough to allege wrongdoing in the prior action is belied by the complaint in the prior action itself, which asserted that Kaweah was guilty of "inequities" and "shorted" the growers by making preferential payments to other creditors. When they filed the prior action, plaintiffs believed defendants made only 34 percent of the payments they were obligated to make. No more than this was needed to support a prayer to recover the remaining money in the original complaint. "In a suit for accounting, the pleader is not required to state specifically facts

peculiarly within the knowledge of the opposite party." (*Hillman v. Stults* (1968) 263 Cal.App.2d 848, 869.) If facts supporting legal theories such as fraud were found in discovery, plaintiffs could have amended their complaint to allege those theories. Instead, plaintiffs chose to treat their prior action as a discovery device, agreeing to settle it and dismiss defendants with prejudice after obtaining their agreement to supply information. In doing so, plaintiffs split the cause of action derived from their primary right to be paid for the oranges, barring the way for a subsequent action based on the same primary right.

In addition to arguing that it was impossible to plead an accounting and a damages action together, plaintiffs attempt to delineate two primary rights as follows: On the one hand, there was "the primary right of growers to be [apprised] of the proceeds of their fruit sales," which they asserted in the accounting action, and on the other they had "[t]he primary right … to be free from mishandling and fraudulent behavior regarding the proceeds of the fruit sales," which they asserted in the present case.

This argument confuses primary rights with remedies. Nonpayment is the only injury plaintiffs have alleged. A determination of the amount due via an accounting and the payment of that amount are remedies. The cases on which plaintiffs rely do not present analogous facts. (*Agarwal v. Johnson, supra,* 25 Cal.3d at pp. 954-955 [state suit for defamation and intentional infliction of emotional distress based on different cause of action than federal civil rights suit, though based on same termination of employment]; *Le Parc Community Assn. v. Workers' Comp. Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1164, 1171-1173 [application for workers' compensation benefits based on different primary right than negligence lawsuit against uninsured employer]; *Branson v. Sun-Diamond Growers, supra,* 24 Cal.App.4th at p. 343 [successive actions for statutory indemnity and implied contractual indemnity asserted different primary rights].)

Finally, relying on *Greenfield v. Mather* (1948) 32 Cal.2d 23, 35, plaintiffs claim we can and should discretionarily decline to apply res judicata because applying it will

result in manifest injustice. This argument is based on the contention that the damages action could not be brought until after plaintiffs possessed information uncovered by the accounting action. For the reasons we have already stated, however, plaintiffs could have sought damages in the prior action.

The prior and present lawsuits split a single cause of action. The trial court correctly sustained defendants' demurrers on grounds of res judicata. Plaintiffs do not contend that their complaint could be amended to overcome those grounds.

DISPOSITION

The motion to dismiss the appeal is denied. The judgment is affirmed. Costs are awarded to respondents.

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Wiseman, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Levy, J.